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The Case of Colonel Abel

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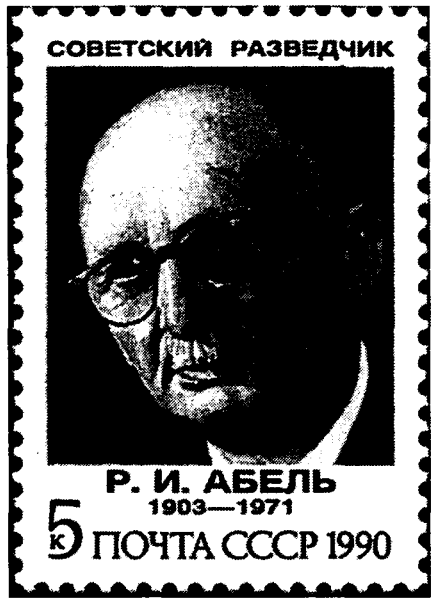

MULTUM IN PARVO[1]

INTRODUCTION

In June 2010, journalists for the Associated Press reported the arrest of ten Russian spies, all suspected of being "deep-cover" illegal agents in the United States.[2] Seeking to convey the magnitude of this event, the

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* Assistant Professor of Law, Southern Methodist University. This article resulted from an invitation by the U.S. Department of Justice to address an international conference on Russian criminal law held at the A.I. Herzen Russian State Pedagogical University in St. Petersburg, October 6-8, 2010. Presentations based on this article were also made at the University of Wisconsin and the University of Helsinki on October 14 and 29, 2010, respectively. I thank Vin Arthey, Jeff Bellin, Bill Bridge, Louis Fisher, Fred Moss, Lynn Murray, Anthony R. Palermo, Meghan Ryan, Harry Shukman, Jenia Turner, Matthew Waxman, and my seminar students at SMU, particularly Nicole Hay.

1. "There is much in little." This five-kopeck Soviet postage stamp bears Abel's image under the heading, "Soviet intelligence officer." The stamp is available at http://en.wikipedia. org/wiki/File:1990_CPA_6265.jpg.

2. Pete Yost & Tom Hays, *10 Alleged Russian Secret Agents Arrested in U.S.*,

journalists wrote that this "blockbuster series of arrests" might even be as significant as the FBI's "famous capture of Soviet Col. Rudolf Abel in 1957 in New York."[3] The reference may have been lost on many Americans, but Colonel Abel's story of American justice at a time of acute anxiety about the nation's security is one that continues to resonate today. The honor, and error, that are contained in Colonel Abel's story offer lessons worth remembering as the United States struggles against a new enemy: international terrorists. One important lesson is that *ad hoc* departures from the requirements of constitutional criminal procedure, even in the pursuit of seemingly exigent and unique national security threats, tend to cause more trouble than they are worth. Another is that these lessons have been repeatedly learned and, it would seem, repeatedly forgotten. We should be in the process of relearning these lessons today. In that spirit, after briefly summarizing Colonel Abel's case and some of the themes it shares with contemporary cases, this article presents selected aspects of Colonel Abel's arrest, trial, and appeal.

Early in the morning of June 21, 1957, almost exactly fifty-three years before the June 2010 arrests, Special Agents Edward Gamber and Paul Blasco of the FBI pushed their way into Room 839 at the Hotel Latham in Manhattan.[4] The FBI agents sat a sleepy and half-naked Abel on his bed, identified themselves as charged with investigating matters of internal security, and questioned him for twenty minutes, insinuating knowledge of his espionage activities by addressing him as "Colonel."[5] The FBI agents told Abel that "if he did not 'cooperate,' he would be arrested before he left the room."[6] When Abel refused, the FBI signaled to agents of the Immigration and Naturalization Service (the INS, then under the authority of the Department of Justice), who were waiting outside. Under the close observation of the FBI agents, the INS agents arrested Abel, searched him and the contents of his room, and seized several items as evidence of Abel's alienage.[7] Immediately after Abel had "checked out" of the hotel with an INS escort, the FBI agents obtained permission from the hotel manager to

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ASSOCIATED PRESS, June 28, 2010.

3. *Id.*

4. "Pushed" is the verb Special Agent Blasco chose to describe their entry. Direct Examination of FBI Special Agent Paul J. Blasco. Transcript of Record at 175, Abel v. United States, 362 U.S. 217 (1960), No. 2 [hereinafter Transcript]. The Transcript of Record may be accessed digitally through the "U.S. Supreme Court Records and Briefs, 1832-1978" series available through the Gale Database, http://find.galegroup.com/.

5. *Id.* at 179-183. Abel was also directly informed that the FBI had "received information concerning [his] involvement in espionage." *Id.* at 184.

6. United States v. Abel, 258 F.2d 485, 492 (2d Cir. 1958); Mildred Murphy, *F.B.I. Sifts Abel's Possessions for Possible Clues to Espionage; Cryptic Notes, Films, Scribbled Names and Commonplace Objects Found in Suspect's Rooms Studied Here*, N.Y. TIMES, Aug. 9, 1957, at 8.

7. Abel v. United States, 362 U.S. 217, 223-24 (1960). Abel did not consent to any search, nor was his consent sought. *Id.* at 223.

search Room 839 themselves. There they found a cipher pad, a hollowed-out pencil, and microfilm, all of which became evidence used to convict him at his criminal trial.[8]

Neither the FBI nor the INS sought a warrant signed by a federal judge or a U.S. Commissioner to arrest Abel or to search his room.[9] The immigration agents possessed only an administrative order signed by another Justice Department official, the INS District Director in New York, granting them authority to detain Abel on a suspected immigration violation.[10] The initial decision to bypass the standard warrant procedure was perhaps driven by difficulties of surveillance, although Abel's whereabouts were known long enough before his arrest to have obtained a judicially authorized arrest warrant.[11] "We were well aware of what he was when we picked him up," the Commissioner of Immigration, Lt. Gen. Joseph M. Swing, told reporters. "Our idea at the time was to hold him as long as we could. . . . [W]e were holding him in the hope that sufficient evidence could be gathered to indict him."[12] The Commissioner said that

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8. Abel v. United States, 362 U.S. at 225. Abel tossed these three items into a wastebasket prior to leaving his hotel room under arrest. The cipher pad was hidden in a piece of wood wrapped with sandpaper. The microfilm was hidden in the pencil. Brief for the United States at 23, Abel v. United States, 362 U.S. 217 (1960), No.2, 1959 WL 101553.

9. United States v. Abel, 258 F.2d at 490. At the time, a United States Commissioner performed several roles now tasked to a United States Magistrate Judge, including issuing search and arrest warrants. *See* Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, 14 AMER. J. L. HISTORY 1, 2 (Jan. 1970).

10. United States v. Abel, 258 F.2d at 491. Section 242(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1252(a), granted the INS this administrative arrest power. Abel v. United States, 362 U.S. at 232.

11. According to Anthony R. Palermo, a key member of the prosecution team, Abel was initially observed by FBI agents as early as mid-May, more than a month before his arrest. But the agents staking out his Brooklyn studio lost track of him, and did not observe him again until the night of Wednesday-Thursday, June 19-20th, when he was followed to the Hotel Latham. Interviews with Anthony R. Palermo, August 2 and September 17, 2010. In an affidavit submitted for Abel's criminal trial, Department of Justice Special Attorney Kevin T. Maroney averred that no arrest warrant was sought because the Government believed (due to the unwillingness of the Government's key witness, a Soviet defector, to testify) that it had insufficient evidence available to secure either an arrest warrant or an indictment at that time. Affidavit of Kevin T. Maroney, Transcript, *supra* note 4, at 57. Mr. Palermo drafted Maroney's affidavit based on his personal interviews with FBI and INS agents. It should be noted that the reluctance of this witness to testify at trial would not seem to have been an insurmountable impediment to obtaining a warrant to search Abel's studio (although alerting Abel's Soviet bosses that his cover was blown, as would his criminal arrest) and a superseding indictment could certainly have been obtained following a lawful arrest and search.

12. Richard C. Wald, *Spy Hunters Had Eye on Abel a Year*, N.Y. HER. TRIB., Aug. 12, 1957, at 1 (as reproduced in Transcript, *supra* note 4, at 75-78). As discussed further below, Commissioner Swing's reference to indictment appears to have been a *post hoc* rationalization of the FBI's failure to turn Abel into a double agent. This ambition was not fantastical, notwithstanding Abel's stoic refusal to cooperate; a senior Soviet intelligence officer, Alexander Mikhailovich Orlov, fled to the United States in 1938 and published *The*

his officers would not have arrested Abel had the FBI not requested that they do so.[13] In other words, the immigration law was used as a pretext for the INS to arrest the man that the FBI wanted to detain itself, but thought it could not.

But there seems to be more to this story, for it may not have been mere doubt about the *power* to detain Abel that led to this tandem operation. As already noted, reasonable minds might differ about whether the FBI had probable cause to arrest Abel and search his rooms.[14]

Another explanation for the FBI's warrantless arrest might have been the FBI's desire to keep Abel's detention absolutely secret; a warrant would have required an arraignment, the opportunity for legal counsel, and the potential for press coverage. What transpired *after* Abel's detention suggests that avoiding the publicity that a standard arrest and arraignment would generate may well have influenced the FBI's *modus operandi*. At the Hotel Latham, the INS gave Abel a written order to appear at INS offices in Manhattan to show cause why he should not be deported.[15] Perhaps because he was "the most professional spy we have yet encountered" (as his prosecutor later informed a rapt press corps), Abel remained there for only a few hours.[16] Instead, later that day, he was secretly bustled onto a special plane waiting for him in Newark and flown thirteen hours to a federal detention center in McAllen, Texas.[17] He was held there for almost seven weeks. During this time the FBI (not the INS) questioned him in lengthy interrogation sessions and without a lawyer. The FBI hoped to turn him into a double agent or at least obtain intelligence about Soviet espionage.

Secret History of Stalin's Crimes (1952). The defection of Abel's subordinate, which led to Abel's arrest, may have further encouraged hope to capitalize on Abel's own opportunism. The FBI misjudged its quarry.

13. Wald, *supra* note 12.

14. *See supra* note 11. During Abel's detention in Texas, discussed *infra*, one of the FBI agents involved in his arrest submitted an affidavit to a federal judge in support of a warrant to search Abel's Brooklyn studio. The affidavit stated that Abel had been "taken into custody" by INS officials and that "subsequent to his arrest" Abel had revealed his identity and citizenship to INS officials. The affidavit made no mention of the involvement of the FBI in either Abel's arrest, interrogation, or continuing detention in Texas, where this information was obtained. Affidavit of Agent Joseph F. Phelan, Transcript, *supra* note 4, at 48-49.

15. Order To Show Cause and Notice of Hearing, reproduced in Transcript, *supra* note 4, at 34-37. The order compelled Abel to appear at 70 Columbus Avenue in Manhattan on July 1, 1957, and informed him that he had the right to appear with counsel, to present evidence and witnesses, and to cross-examine government witnesses. *Id.* at 35-36.

16. *The Rise and Ruin of a Successful Spy*, LIFE MAG., Aug. 19, 1957, at 22. The quotation is from Assistant U.S. Attorney William F. Tompkins.

17. Brief for Petitioner at 7, Abel v. United States, 362 U.S. 217 (1958), No.2, 1958 WL 91804. Frank Gibney, *Intimate Portrait of a Russian Master Spy*, LIFE MAG., Nov. 11, 1957, at 126.

But Colonel Abel met threats and blandishments alike with stony silence.[18] The FBI finally gave up. He was quickly processed through deportation proceedings (for which he was permitted a lawyer), found deportable, but not deported.[19] Instead, after three more weeks of interrogation without the benefit of any counsel, Abel was returned to New York to face capital charges of military and atomic espionage.[20] Only with the announcement of his indictment on August 7th, did his forced disappearance come to an end.[21]

Abel had been held by federal agents in solitary confinement and total secrecy for forty-eight days, two thousand miles from the place of his initial arrest, without meaningful access to counsel, and without having appeared before any judicial officer for any reason.[22] The Justice Department had

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18. Brief for Petitioner, *supra* note 17, at 7. Today, his silence might not be considered sufficient to invoke his Fifth Amendment right to have an attorney present during a custodial interrogation. In Berghuis v. Thompkins, 130 S.Ct. 2250, 2253-2254 (2010), the Supreme Court held that the right must be invoked "unambiguously." The Court held that Thompkins had not invoked his right by sitting "largely silent" through two hours and forty-five minutes of interrogation before giving an inculpatory response and that he had knowingly and freely waived this right when this silence was finally overcome and he chose to respond to his interrogators' questions.

19. Exactly when Abel was permitted to consult with a lawyer is disputed. The affidavit of Abel's attorney at his criminal trial, James B. Donovan, whose integrity and professionalism were praised throughout and after the trial, states that "[a]lthough he promptly requested counsel in McAllen, his request was denied and he was held incommunicado for five days, with daily questioning." Affidavit of James B. Donovan, Transcript, *supra* note 4, at 24. Abel himself said that his request for counsel was denied on the morning of his arrival in McAllen and he was questioned from nine in the morning until midafternoon that day (a Saturday), followed by six hours of questioning on Sunday and again on Monday by two teams of FBI agents working "in relays." On Tuesday, Abel averred that he gave his name (an alias) and was then allowed counsel for purposes of his deportation hearing, which was held that Thursday. Abel states that after he was found deportable he was then questioned daily by FBI agents for the next three weeks. He does not state whether his lawyer was present at these sessions, though that is doubtful given that his limited role in Abel's deportation proceedings had concluded. Abel stated that he was "served ... with a criminal warrant for [his] arrest" during his sixth week of secret detention. Affidavit of Rudolf Ivanovich Abel, Transcript, *supra* note 4, at 30-31, 33. The affidavit of Kevin T. Maroney, a special attorney from the Justice Department's Internal Security Division, stated that Abel did not request an attorney for the first four days of his detention and disputed Abel's characterization of the intensity of his initial interrogation. Affidavit of Kevin T. Maroney, Transcript, *supra* note 4, at 60-61. It should be noted, however, that Maroney did not dispute (or even reference) Abel's claim to have been questioned by the FBI daily for three weeks after his deportation hearing was held and prior to both the issuance of a judicial warrant for his arrest and his indictment.

20. Russell Porter, *Spy Suspect Fights Use of Seized Tools*, N.Y. TIMES, Sept. 15, 1957, at 1.

21. Brief for Petitioner, *supra* note 17, at 8. *Espionage: Artist in Brooklyn*, TIME MAG., Aug. 19, 1957.

22. Brief for Petitioner, *supra* note 17, at 7-8.

used the immigration laws as a pretext to accomplish this secret arrest, which was otherwise impossible in our system of criminal justice.

The resonance between Abel's treatment and the seizure and extraordinary detention of suspected terrorists in the years after September 11, 2001, is striking. For example, U.S. citizen Jose Padilla was detained on a judicially authorized material witness warrant for thirty-three days in 2002.[23] Ostensibly, the arrest was to secure his testimony for the ongoing grand jury investigation into the September 11th attacks, but in reality the arrest was preventive detention on suspicion that he was plotting a major terrorist attack himself. On the eve of a hearing about Padilla's legal status (at which he would have been represented by counsel), the warrant was vacated at the government's request.[24] Padilla was transferred to military custody, where he was held as an enemy combatant for almost four years with no substantial contact with counsel. For the first six months, he was held without any judicial decision regarding the lawfulness of his detention.[25] In March 2011, the Supreme Court heard the case of Abdullah Al-Kidd, another American who alleges that the federal material witness statute was used as a pretext to arrest, interrogate, and mistreat him on the basis of terrorism suspicions that were insufficient to satisfy the Fourth Amendment's requirements for a lawful arrest.[26] The Supreme Court (in an opinion handed down just as this article was going to press) declined to resolve the difficult issues presented by the allegations of pretext in the case.[27]

But even Padilla and Al-Kidd were not made to disappear in the way that Abel did. The material witness statute used to justify their detention at least required that a neutral magistrate authorize a warrant for their seizure and that they be brought to a court for a public hearing shortly after being

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23. Padilla *ex rel.* Newman v. Bush, 233 F. Supp.2d 564, 571 (S.D.N.Y. 2002).

24. *Id.* at 572.

25. *Id.* at 571; Hanft v. Padilla, 546 U.S. 1084 (2006). Donna Newman was Padilla's assigned counsel. For a careful study of her efforts on behalf of her client both in and out of the material witness statute framework, see LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS 197-209 (2008).

26. Al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009), *cert. granted*, 131 S.Ct. 415. Oral argument was held on March 2, 2011. The material witness statute, 18 U.S.C. §3144, authorizes a judicial officer to issue a warrant for the arrest of a witness if "it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena." The statute also contemplates judicial consideration of less intrusive means of securing the testimony of the witness.

27. Ashcroft v. al-Kidd, 563 U.S. __(2011). In a concurring opinion joined by Justices Ginsburg, Breyer, and Sotomayor, Justice Kennedy noted "the difficulty of these issues," and observed that the Court's holding left "unresolved whether the Government's use of the Material Witness Statute in this case was lawful." Ashcroft v. al-Kidd, No. 10-98 (U.S. May 31, 2011), *slip op.* at 1-2 (Kennedy, J., concurring).

seized, a hearing at which they had the right to be represented by counsel.[28] Abel was only provided counsel for the few hours consumed by his deportation hearing; the rest of his summer was spent in lawyer-less, secret detention and subject to frequent interrogation.[29] Padilla's detention also differed significantly from Abel's in that it was announced almost immediately by the Attorney General, ironically enough, at a press conference in Moscow.[30]

After 9/11, transparency has not always been the default. In the immediate aftermath of the terrorist attacks, Chief Immigration Judge Michael Creppy ordered the closure of "special interest" immigration hearings that many subsequently suspected to have involved the same pretextual conduct evidenced in Abel's case.[31] In the words of Yogi Berra, was this déjà vu all over again?

Who was this Colonel Abel, whose case would be argued twice before the United States Supreme Court? Who was his American lawyer, James Donovan? Why did he take this case, how did he argue it, and what resonance does the matter have for American criminal law and criminal procedure? Ideologically driven, international terrorists are today's nearest analogue to Communist agents in the atmosphere of hyper-fear that was still so palpable in the shadow of the McCarthy era. What lessons can be learned from the case of Colonel Abel as the United States struggles to balance national security and justice in its pursuit of suspected terrorists?

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28. 18 U.S.C. §3144. This statute incorporates by reference 18 U.S.C. §3142(f): "The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days . . . , and a continuance on motion of the attorney for the Government may not exceed three days. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed."

29. *See supra* note 19.

30. *U.S. Arrests Man Allegedly Planning Attack*, NewsHour, June 10, 2002, *available at* http://www.pbs.org/newshour/updates/dirtybomb_06-10-02.html.

31. Memorandum from Michael Creppy to all immigration judges and court supervisors, September 21, 2001, *available at* http://fl1.findlaw.com/news.findlaw. com/hdocs/docs/aclu/creppy092101memo.pdf. A circuit split resulted that the Supreme Court declined to resolve. The Sixth Circuit held that the Creppy order violated the First Amendment. Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002). The Third Circuit, on the other hand, sustained Judge Creppy's closure order by distinguishing immigration hearings from other judicial hearings with a greater tradition of openness. North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3rd Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003). The justification offered by the FBI for closed deportation hearings was very similar to the national security interest advanced in keeping Abel's arrest a secret: "insight gleaned from open proceedings might alert vigilant terrorists to the United States' investigative tactics and could easily betray what knowledge the government does-or does not-possess." *North Jersey Media Group*, 308 F.3d at 200.

As already noted, one lesson is that the reluctance to pursue Abel through regular criminal justice processes was unnecessary and even potentially damaging to the Government's national security interests. In the end, it was the evasion of general rules – because of the certainty of government officials that this case was an exceptional one – that required the Government to defend its actions in two separate oral arguments before the Supreme Court. Although the Court sustained the Government's actions, it did so by a single vote in a weak judicial opinion that could easily have gone the other way. Had the United States followed normal procedure, Abel would still have been convicted, but without the need to justify this exceptionalism and risk the loss of its biggest catch yet in the Cold War.

The Abel case is a fecund study worthy of book-length treatment.[32] In this brief article, I will explore just three topics: the appointment of counsel; the defense's investigation and cross-examination of witnesses for the prosecution; and the defense motion to suppress the evidence obtained through the tandem conduct of the FBI and the INS that midsummer's morning. It was this motion that brought Abel's case to the attention of the highest court in the land.

FBI MUG SHOT OF RUDOLF ABEL[33]

I. WHO WAS COLONEL ABEL?

But first, who was Colonel Abel? Even the most basic details of the life of a master Soviet spy are shrouded in obscurity. Rudolf Ivanovich

32. Indeed, it has been the subject of such treatment in the United States, JAMES B. DONOVAN, STRANGERS ON A BRIDGE: THE CASE OF COLONEL ABEL (1964) [hereinafter DONOVAN], and in the United Kingdom, VIN ARTHEY, LIKE FATHER LIKE SON: A DYNASTY OF SPIES (2004) [hereinafter ARTHEY]. With the exception of Donovan's own diary-driven recollection of the case, no one has written a book focused on the legal issues presented by the case.

33. This FBI mug shot is available at *Famous Cases & Criminals*, FBI.GOV, http://www.fbi. gov/about-us/history/famous-cases/hollow-nickel/rudolph-ivanovich-abel-hollow-nickel-case/.

Abel was born in 1903 as William August Fisher in what was then the outskirts of the city of Newcastle upon Tyne in northern England.[34] He was the son of Heinrich Fischer, a well-educated metalworker born in Russia of German ancestry who would later flee Tsarist Russia to found the Newcastle branch of the Russian Social Democratic Workers' Party and assist in the publication and distribution of the party organ, *Iskra*, while Vladimir Lenin was quartered in London.[35] As a teenager, Abel moved from England to Moscow, where his father took a short turn on the Comintern's UK desk before Lenin's death made the life of an old Bolshevik a precarious one.[36] Abel married and the couple was blessed with a daughter.

Abel's British citizenship meant a legitimate Western European passport, his Newcastle upbringing gave him native English fluency, and his wife and child in Moscow were excellent insurance against defection; this plus his worker's credentials and internationalist upbringing were (to quote Humphrey Bogart quoting Shakespeare) the stuff that dreams are made of – that is, if the dreamer recruited for the Soviet clandestine services.[37] After surviving the Stalinist purge and with a distinguished record in World War II (no mean feat, either one), Abel became an "illegal" KGB intelligence officer – i.e. one formally unassociated with the Soviet Embassy or other official mission – active in Oslo and London before he ran all Soviet espionage in North America for nine years.[38]

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34. ARTHEY, *supra* note 32. Because Abel is the name by which Fisher was known during his trial, I use it here for consistency with most primary sources. His real identity was unknown until 1972, when an American journalist found both "Abel" and "Fisher" carved in his tombstone in Moscow's Donskoi Cemetery. JOHN COSTELLO & OLEG TSAREV, DEADLY ILLUSIONS 372 (1993). It should be noted that some have questioned the integrity of this book due to the active role of the Russian foreign intelligence service in selecting its author and allowing him selective access to its records. CHRISTOPHER ANDREW & VASILI MITROKHIN, THE MITROKHIN ARCHIVE: THE KGB IN EUROPE AND THE WEST 26-27 (1999). To his credit, Costello is clear about this collaboration but does so while effusively thanking Vladimir Kryuchkov, the KGB's last chairman and a plotter in the coup against Gorbachev. COSTELLO & TSAREV, *supra,* at vii. The "real" Rudolf Ivanovich Abel was actually a very close friend of Fisher and a fellow KGB officer. ARTHEY, *supra* note 32, at 114-116. Unbeknownst to Fisher, Abel had died shortly after Fisher left Moscow for what would be his last assignment. ARTHEY, *supra* note 32, at 226. The name had been used as the agreed means to signal Moscow that Fisher had been arrested, but its use in this way after the death of his friend apparently haunted Fisher. ARTHEY, *supra* note 32, at 226; ANDREW & MITROKHIN, *supra*, at 225.

35. ARTHEY, *supra* note 32, at 3, 11, 21-23.

36. *Id.* at xxxi, 66-68.

37. Sam Spade in *The Maltese Falcon* (1941); William Shakespeare, *The Tempest*, Act 4, scene 1, lines 156–158.

38. DONOVAN, *supra* note 32; ARTHEY, *supra* note 32, at 87-116, 163. He was apparently also active in France and Turkey. ARTHEY, *supra* note 32, at 124. Evidence at his trial established links of various strengths to Morris and Lona Cohen, a.k.a. Peter and Helen Kroger, arrested in Britain along with Gordon Lonsdale, and Helen Sobell, wife of

That all came crashing down with his arrest in Manhattan, secret interrogation in Texas, and trial in the U.S. District Court for the Eastern District of New York, which sits in Brooklyn. The trial required ten days, the prosecution called twenty-seven witnesses, and over one hundred exhibits were admitted into evidence.[39] The prosecution's case revolved around the testimony of Reino Hayhanen, Abel's incompetent subordinate, who had secretly defected to the United States.[40] Due to a surprising lapse by a spy as accomplished as Abel, Hayhanen had learned the location of Abel's workplace in Brooklyn.[41] It was also probably due to Hayhanen's own incompetence that a local newsboy acquired a hollowed-out nickel containing an encrypted message to Hayhanen, physical evidence that figured prominently at trial.[42] It was Hayhanen's initial refusal to testify against his former superior officer that led the FBI to enlist the assistance of the INS in Abel's arrest.[43] Abel was caught surrounded by the tools of his trade, ample evidence to support espionage charges.[44] Under the immigration statutes at that time, no judicial approval was necessary for federal executive agents to detain Abel and search his effects.[45] But it was this pretextual use of administrative powers under the immigration laws – a sham in fact intended to pressure Abel to become a double agent or, failing that, to gather evidence for his criminal prosecution – that attracted the interest of the Supreme Court, not Abel's notoriety.[46]

Morton Sobell, a co-defendant in the Rosenberg case. ROBERT J. LAMPHERE & TOM SCHACTMAN, THE FBI-KGB WAR: A SPECIAL AGENT'S STORY 274-278 (1986). Subsequent information suggests connections with American scientist Ted Hall, Soviet spy and defector Alexander Orlov, and the Rosenbergs. ANDREW & MITROKHIN, *supra* note 34, at 193-195; JOSEPH ALBRIGHT & MARCIA KUNSTEL, BOMBSHELL: THE SECRET STORY OF AMERICA'S UNKNOWN ATOMIC SPY CONSPIRACY, 196-97, 221-22, 244-253 (1997) (Cohens & Hall); EDWARD VAN DER RHOER, THE SHADOW NETWORK: ESPIONAGE AS AN INSTRUMENT OF SOVIET POLICY 160-161 (1983) (Rosenbergs). Notwithstanding these links, others have judged his career to have been a "pedestrian reality" that "achieved nothing of real significance." ANDREW & MITROKHIN, *supra* note 34, at 229.

39. DONOVAN, *supra* note 32, at 245-246.

40. *Espionage: Pudgy Finger Points*, TIME MAG., Oct. 28, 1957.

41. DONOVAN, *supra* note 32, at 146; ARTHEY, *supra* note 32, at 208-210.

42. DONOVAN, *supra* note 32, at 185-86; LAMPHERE & SCHACTMAN, *supra* note 38, at 274. The newsboy found the nickel in 1953 and gave it to the local police, who sent it to the FBI. Robert Lamphere, the FBI specialist who examined the nickel and the cipher it contained, wrote a memo that (unsuccessfully) urged an immediate redeployment of manpower to search for an illegal Soviet intelligence officer in New York. LAMPHERE & SCHACTMAN, *supra* note 38, at 270-272.

43. Brief for the United States at 6, Abel v. U.S., 362 U.S. 217 (1958), No.2, 1958 WL 101553.

44. *See supra* note 10 and accompanying text.

45. *See supra* note 11.

46. Abel v. United States, 362 U.S. 217, 219-220 (1960) ("Of course, the nature of the case, the fact that it was a prosecution for espionage, has no bearing whatever upon the legal considerations relevant to the admissibility of evidence.").

The jury deliberated for three and a half hours before convicting Abel on October 25, 1957, on all three counts of the indictment for conspiring to obtain and transmit national defense information to the Soviet Union as an unregistered foreign agent.[47] The speed with which the jury returned its verdict might suggest that its value as a protection of Abel's (or a suspected terrorist's) rights is overstated. But as will be discussed below, the jury's presence was important to Abel not only for the power it transferred from the state to the people at large, but for the adversarial process and rules of evidence that it imposed on the trial as a whole. Questions of process and evidence – access to and rights of counsel, rules for the authentication and admissibility of evidence, burdens of production, and standards of proof – drive the current debate over the choice of civilian courts or military commissions to prosecute suspected terrorists as much as substantive questions about whether the criminal law or the law of armed conflict should govern proceedings about terrorism offenses.

Abel was spared execution (conspiracy to transmit atomic secrets, count one of the indictment, was a capital offense) largely because of his lawyer's foresight and skill in articulating the national interest in preserving Abel's life for an exchange of agents at some future date; instead, he was sentenced to thirty years in prison. Abel would not complete his sentence. On the cold morning of February 10, 1962, Abel was exchanged for captured U-2 pilot Francis Gary Powers on the Glienicke Bridge that connected Potsdam with Soviet-controlled East Berlin.[48] Abel's attorney, James Donovan, would be the one to hand Abel over in that exchange but, more importantly, it was he who negotiated the swap in the first place. Thus, the appointment of James Donovan was more crucial than anyone could have anticipated.

II. APPOINTMENT OF COUNSEL

At Abel's side from his initial plea through his trial, conviction, incarceration, and finally his exchange on a wintry German bridge stood James Britt Donovan. Donovan, forty-one years old when he first met Abel, was a Harvard-educated New York City lawyer, former Nuremburg prosecutor, and general counsel to what was known as the O.S.S. during World War II.[49] This exceptional lawyer recorded his work in this case in a book entitled *Strangers on a Bridge*, which is essentially a detailed lawyer's

47. Edith Evans Asbury, *Abel Guilty as Soviet Spy; Could Get Death Sentence*, N.Y. TIMES, Oct. 26, 1957, at 1. Frank Gibney, *Intimate Portrait of a Russian Master Spy*, LIFE MAG., Nov. 11, 1957, at 129.

48. DONOVAN, *supra* note 32, at 3-4; ARTHEY, *supra* note 32, at xvi, *passim*.

49. Mildred Murphy, *Abel, Spy Suspect, Accepts Donovan; Russian Has Long Talk With Former O.S.S. Counsel Who Will Defend Him*, N.Y. TIMES, Aug. 22, 1957, at 3.

diary supplemented with the transcripts and reporting of the trial and appeal.[50] The CIA evidently considered the publication of Donovan's book, two years after the prisoner exchange on the Glienicke Bridge, to be an event of sufficient significance that a secret report was written about it and added to Abel's file.[51] Portions of this report remain redacted more than twenty-nine years later.[52]

Donovan's decision to accept Abel as a client was not one to be taken lightly. First of all, the work would most likely be done *pro bono*, i.e. without compensation. As it turns out, the trial judge approved a fee up to $10,000 out of money seized from Abel following his arrest, but Donovan indicated that he would donate it all to charity (a politic move).[53] Second, the case would likely take a considerable amount of time. As it turns out, the obligation lasted almost four-and-a-half years.[54] Lastly, the notoriety of such an unpopular client in McCarthy-era America could destroy a lawyer's reputation and sink his legal practice. Donovan returned home from his first meeting with his client to find on his desk a drawing made by his eight-year-old daughter depicting "a black-haired, slant-eyed convict in stripes with a ball and chain," with the caption, in a child's hand, "Russian Spy in Jail: Jim Donovan is working for him."[55]

Why, then, did Donovan accept the appointment? He was not a government agent assigned to Abel to ensure his conviction (although Donovan made it clear to Abel that he distinguished sharply between "my duty to him as defense attorney and my duty as an American citizen.").[56] Although it might seem almost offensive to an American lawyer's ears to suggest the idea of a government stooge for a lawyer, this important fact is worth noting. James Donovan was in private practice, a distinguished member of the New York Bar. Donovan had been nominated by a committee of lawyers from the Brooklyn Bar Association after Abel requested the judge to assign counsel with the advice of the Bar.[57] Perhaps

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50. DONOVAN, *supra* note 32.

51. STRANGERS ON THE BRIDGE [SIC] (JUNE 17, 1965), A FIVE-PAGE REPORT, *available at* http://www.foia.cia.gov/browse_docs_full.asp.

52. *Id.*

53. DONOVAN, *supra* note 32, at 14. *See also Dr. James B. Donovan, 53, Dies; Lawyer Arranged Spy Exchange*, N.Y. TIMES, Jan. 20, 1970, at 43.

54. DONOVAN, *supra* note 32, at 3, 16. Abel agreed to Donovan's appointment on August 21, 1957. The prisoner exchange on the Glienicke Bridge occurred on February 10, 1962. The interim period amounts to 1634 days.

55. *See id.* at 15.

56. *See id.* at 31.

57. Assignment of James B. Donovan as Counsel, United States of America v. Rudolph Ivanovich Abel, Order of United States District Judge Matthew T. Abruzzo, Transcript, *supra* note 4, at 20. According to Anthony Palermo, who was sent from the Justice Department's Internal Security Division to be a special attorney in this case, Abel's request for Judge Abruzzo to appoint counsel recommended by the Bar Association (rather than merely appointed at the judge's individual discretion) was rather unusual. Telephone

partly due to his own wartime work as counsel for the OSS, Donovan was convinced of his client's guilt.[58] But Donovan accepted the appointment, and zealously represented Abel's interests until the day they parted on the middle of the Glienicke Bridge.

Donovan was following in the honorable tradition of American lawyers who, once appointed, zealously defend the interests of their clients no matter how infamous or unpopular, often for little or no compensation. Three judges of the U.S. Court of Appeals for the Second Circuit ended their opinion affirming Abel's conviction by thanking Donovan and his assistants, who "represented the appellant with rare ability and in the highest tradition of their profession. We are truly grateful to them for the services which they have rendered."[59] I am proud to note that among those leaders of the bar who wrote to congratulate Donovan on his appointment and offer encouragement was Col. Robert Storey, a fellow Nuremberg prosecutor and former ABA president, who was then serving as Dean of the Law School at Southern Methodist University.[60]

This honorable tradition preceded the adoption of our Constitution – recall the defense by John Adams of British soldiers on trial for the Boston Massacre. And this tradition has been embraced even (perhaps especially) in times of war. One need only think of then Colonel Kenneth C. Royall, who, in defiance of an order by President Roosevelt, sought judicial review for Nazi saboteurs whom he was assigned to represent before a military commission.[61] More recently, one recalls Lieutenant Commander Charles Swift's defense of Salim Hamdan, a detainee at Guantánamo Bay, Cuba. Both lawyers, like Donovan, defended the constitutional rights of their

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Interview with Anthony Palermo, August 2, 2010. Perhaps for this reason, Judge Abruzzo was rather irked by the request, although he complied with it. DONOVAN, *supra* note 32, at 393.

58. DONOVAN, *supra* note 32, at 18 ("There was no question in my mind that Abel was exactly what the government claimed, and that he had decided it would be futile to argue otherwise.").

59. United States v. Abel, 258 F.2d 485, 502 (1958). According to Donovan, Chief Justice Earl Warren also congratulated him on behalf of the entire Supreme Court following oral argument. DONOVAN, *supra* note 32, at 308.

60. DONOVAN, *supra* note 32, at 27. Other famous names surround the Abel case. On the defense team was Thomas M. Debevoise, of the well-established New York legal family and future Dean of Vermont Law School. DONOVAN, *supra* note 32, at 56; Dennis Hevesi, *Eli Whitney Debevoise Dies at 90; Co-Founder of a Top Law Firm,* N.Y. TIMES, July 1, 1990; *Law School Dedicates $6.5 Million Renovation to Tom Debevoise,* THE HERALD OF RANDOLPH, May 26, 2005, http://www.rherald.com/news/2005-05-26/Front_page/f07.html. For the prosecution, there was Cornelius W. Wickersham, Jr., DONOVAN, *supra* note 32, at 68.

61. LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 43-45, 55-59 (2005).

infamous clients, and thus the interests of justice, right up to the Supreme Court.[62]

Although the right to the assistance of counsel is constitutionally protected,[63] and members of the bar are encouraged to offer *pro bono* service of the sort Donovan committed to provide, no lawyer is required to do so, or do so for any particular client. The fact that such clients are thus avoidable, combined with the pressures faced by lawyers who accept such assignments, makes the individual courage they must possess all the more admirable. Sadly, every crisis seems to require a relearning of old truths. Perhaps it was inevitable that a senior official at the United States Department of Defense, ignorant of or uninterested in the lessons of the past, crudely attacked the lawyers working *pro bono* to represent detainees at Guantánamo Bay.[64] He was rightly excoriated by the private bar as well as members of the Bush Administration, who ultimately forced his apology and resignation.[65]

III. DEFENSE INVESTIGATION AND CROSS-EXAMINATION

A. Negotiating the Rules in Abel's Case

Appointed by the court and accepted by his client, Donovan immediately started work. Donovan tried to persuade the U.S. Attorney to adopt for Abel's case the European requirements of broad pretrial disclosure that Donovan had followed as a young prosecutor at Nuremburg.

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62. Royall's case was ultimately decided as the ignominious *Ex parte* Quirin, 317 U.S. 1 (1942). Swift's case became Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Roughly two weeks after the Supreme Court decided the case, Swift was informed that he had been denied a promotion and, under the Navy's "up-or-out" system, was therefore forced to resign his commission. Carol Rosenberg, *Guantánamo Defense Lawyer Forced out of Navy*, SEATTLE TIMES, Oct. 8, 2006, *available at* http://seattletimes.nwsource.com/html/nationworld/2003294468_ lawyer08.html. It should be noted that there could also be a cost to prosecutors. Colonel Morris Davis was chief prosecutor at Guantánamo Bay. He retired after twenty-five years of service in the Air Force, citing Pentagon interference with his prosecutorial discretion and his conclusion that the procedural rights of the accused were insufficiently protected by rules governing the military commissions in which he was ordered to participate. Josh White, *Ex-Prosecutor Alleges Pentagon Played Politics*, WASH. POST, Oct. 20, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/10/20/AR2007102000179.html.

63. U.S. CONST. amend. VI.

64. Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1 (reporting comments by Charles D. Stimson, the deputy assistant secretary of defense for detainee affairs, "I think, quite honestly, when corporate C.E.O.'s see that those firms are representing the very terrorists who hit their bottom line back in 2001, those C.E.O.'s are going to make those law firms choose between representing terrorists or representing reputable firms, and I think that is going to have major play in the next few weeks. And we want to watch that play out.").

65. *Official Quits After Remark on Lawyers*, N.Y. TIMES, Feb. 3, 2007.

The U.S. Attorney refused to agree to anything more than the Federal Rules of Criminal Procedure required of him, believing "that so general a pretrial disclosure would be an unfortunate precedent for criminal prosecutions" in the United States.[66] Today, ironically, in the habeas corpus proceedings for detainees at Guantánamo Bay, the Supreme Court's ruling in *Hamdi v. Rumsfeld* has permitted more European-style inquisitorial principles to replace the rules of evidence that traditionally define our adversarial system. This comparison is explored below. But let us return first to Donovan's case.

As it turns out, a small revolution in criminal procedure had occurred just months before Donovan was appointed to defend Abel. In June 1957, the Supreme Court announced its opinion in *Jencks v. United States*.[67] Clinton Jencks, a union leader, had been convicted of lying to the National Labor Relations Board about his membership in the Communist Party.[68] Jencks sought the production of numerous reports made by two paid FBI informants who testified against him.[69] Justice Brennan, writing for the Court, overturned the conviction obtained without permitting the defense to inspect these reports, noting that "[e]very experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory."[70] If the state wished to invoke a privilege against production – say for national security reasons – the price of that decision was "letting the defendant go free [since] it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."[71]

These words are worth noting today, when fear of terrorists has replaced fear of communists. The state feels the same pressure to imprison (whether upon criminal conviction or as military detention) without fully disclosing its grounds for doing so. Justice Brennan quoted Justice

66. DONOVAN, *supra* note 32, at 26.

67. Jencks v. United States, 353 U.S. 657 (1957). Mildred Murphy, *Abel, Spy Suspect, Accepts Donovan; Russian Has Long Talk with Former O.S.S. Counsel Who Will Defend Him*, N.Y. TIMES, Aug. 22, 1957, at 3. Donovan, and the press, were aware of its implications for the Abel case from the start. Mildred Murphy, *Ex-Navy Officer To Defend Abel*, N.Y. TIMES, Aug. 21, 1957, at 10.

68. *Jencks*, 353 U.S. at 658-659. Section 9(h) of the National Labor Relations Act, the Taft-Hartley Act, required each officer of any labor organization seeking the benefits of the Act to swear an affidavit that "he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." Labor-Management Relations (Taft-Hartley) Act, ch. 120, sec.101, §9(h), 61 Stat. 136, 146 (1947).

69. *Jencks*, 353 U.S. at 659.

70. *Id.* at 667.

71. *Id.* at 671.

Sutherland's famous phrase that "the interest of the United States in a criminal prosecution is not that it shall win a case, but that justice shall be done."[72] Nevertheless, it would be another six years before the Supreme Court held that the defendant's right to due process of law also required the prosecution to turn over other potentially exculpatory evidence in its possession.[73]

Fifteen years would pass before justice was seen to require the state to reveal material that could impeach the testimony or character of its own witnesses at trial.[74] Of course, the purpose of detaining a terrorist who meets the criteria for designation as an enemy combatant under the law of armed conflict (and therefore the procedures to be used to make such a determination) is quite different than the objective of a criminal prosecution of a defendant charged with a crime, even one of the many crimes of terrorism. But when the Government's objectives are unclear, or lead to confusion as to which body of law or which system of adjudication is proper, the interests of the United States in both national security and justice are ill-served. As noted below, recent cases concerning detainees in the so-called war on terror demonstrate that these principles remain contested in the context of deciding petitions for writs of habeas corpus.

The *Jencks* opinion led Congress to pass the Jencks Act, which entered into force just two weeks before the date originally set for Abel's trial.[75] It was front page news when Donovan invoked the Act at the conclusion of the direct examination of the prosecution's star witness, Abel's former subordinate and now Soviet defector, Reino Hayhanen. Hayhanen had been on the witness stand for two and a half days, producing 325 pages of testimony; Donovan wanted to compare this story told in court with the "basic raw material of what the man said" to the FBI before the trial began.[76] The court denied Donovan's motion to review notes describing more than 75 FBI interviews on the grounds that the reports were "interpretative," not "substantially verbatim," as required by the statute for release to the defense.[77] But even the modest release that the court did grant Donovan proved the value of such information: one prior statement, written and signed by Hayhanen, directly contradicted his testimony that he had engaged in espionage at Abel's direction. Donovan could then ask the

72. *Id.* at 668 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

73. Brady v. Maryland, 373 U.S. 83 (1963).

74. Giglio v. United States, 405 U.S. 150 (1972).

75. *See* Act of Sept. 2, 1957, Pub. L. 85-269, 71 Stat. 595, 18 U.S.C. §3500.

76. Michael Clark, *F.B.I. Files Asked by Abel's Lawyer*, N.Y. TIMES, Oct. 17, 1957, at 1; DONOVAN, *supra* note 32, at 166-67.

77. Michael Clark, *Abel Trial Lists G.I. As Soviet Spy*, N.Y. TIMES, Oct. 18, 1957, at 1; DONOVAN, *supra* note 32, at 166, 181.

classic question of cross-examination: was Hayhanen lying then or lying now?[78]

The government's second witness was Master Sergeant Roy Rhodes, whom prosecutors presented as a loyal family man blackmailed into providing information to Soviet agents while posted to the U.S. Embassy in Moscow.[79] The prosecution tied him to Abel through Hayhanen as someone the duo sought to contact and pursue after Rhodes returned home to the United States. The Government had agreed to Donovan's requests under the Jencks Act for statements made by Rhodes in the course of his debriefing by U.S. counterintelligence officers. The tapes of these sessions revealed a very different picture of Rhodes, which validated Justice Brennan's observations in the Jencks case but also presented a serious problem for the defense. Rhodes, it turned out, was far from the hapless dupe he had been made out to be. Rather, he appeared to have operated a small business while in Moscow selling secrets for a considerable amount of money, alcohol, and other forms of compensation. But in Donovan's judgment, impeaching him with his own prior statements to federal agents "could rock the American diplomatic representation in Moscow and other foreign capitals," and reveal secret intelligence information damaging to national security.

Providence could not have found a better case or counsel in which to present this issue for decision:

> [T]he prosecution had elected to put Rhodes on the stand. Now I was expected to cross-examine him. The prosecution, I said, had placed me in an outrageous predicament. As court-assigned counsel I was bound to do everything I could for my client; but I was also a United States citizen, still held a commission as a commander in Naval Intelligence, and had worked for three years in the OSS during World War II to help establish a permanent central intelligence system in this country. The last thing I wanted to see happen, I added, would be to have our intelligence apparatus compelled to bring before the jury the contradictory statements of Rhodes. I argued that for this reason, as well as the others I had voiced the day before, the entire testimony of Rhodes should be stricken from the court record.[80]

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78. DONOVAN, *supra* note 32, at 179. Donovan asked this question with subtlety, closing his cross-examination by slowly reading aloud from Hayhanen's statement, pointing out to the jury that it was in the witness's own handwriting. *Id.*

79. *Id.*

80. DONOVAN, *supra* note 32, at 197-198. Donovan's "outrageous predicament" illustrates another tradition in Anglo-American law as honorable and as lasting as the one concerning the appointment of counsel, *supra* text accompanying note 53. That is the

What to do? According to Anthony Palermo, then a member of the prosecution team specially appointed for this case from the Justice Department's Internal Security Division in Washington, such was the confidence that the lawyers for each side had in one another's integrity and professionalism that a sort of "gentleman's understanding" emerged between them about how to balance the lawyer's responsibility to his client with what Donovan apparently considered his duty as an American citizen.[81] Donovan, however, eked out only a statement from the judge to the jury that Rhodes had made conflicting statements and, therefore, although the matter could not be fully revealed because of national security, the fact of that conflict should serve to discredit his testimony about his activities in Moscow.[82] "Such," concluded the judge, "is the purpose of cross-examination."[83] This point was driven home by Donovan's subsequent questioning of Rhodes, which ended with Donovan reminding the dishonored sergeant, with evident disgust, that even Benedict Arnold had not betrayed his country for money.[84]

Today, questions about how to use sensitive national security information are raised more frequently. The issue is now resolved in criminal cases not by gentlemen's agreements but by a federal statute, the Classified Information Procedures Act.[85] This statute provides detailed procedures for the use of classified information (or, more often, suitable

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obligation of zealous defense of the interests of one's client. As Lord Brougham famously characterized this responsibility in Queen Caroline's Case in 1820:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2068 (2010).

81. Telephone Interview with Anthony Palermo, Aug. 2, 2010.

82. DONOVAN, *supra* note 32, at 197-201.

83. *See id.* at 199.

84. *See id.* at 206. I asked Anthony Palermo whether this ruling was fair to Donovan, since he could have engaged in a far more prolonged cross-examination of Rhodes, albeit at the expense of revealing information potentially embarrassing or damaging to American intelligence. Mr. Palermo, who has maintained a distinguished career in public service and private practice after his role in the Abel case, felt that Donovan had done a "good job with a bad hand" in the case. Prolonging Rhodes' time on the stand, he noted, risked antagonizing the jury by appearing to brow beat a defeated man in uniform (even one who had disgraced that uniform). Donovan "did not have to go to the bottom of the pit," to establish that Rhodes was an unsavory character. Telephone Interview with Anthony Palermo, August 2, 2010. Any speculation as to whether Donovan was forced to pull his punches by his perception of the conflict between his roles as counsel and citizen should be balanced with these tactical considerations.

85. Classified Information Procedures Act, 18 U.S.C. App. III, §§1-16 (1980).

substitutions or unclassified summaries of it) that balance the interests of the defense in the presentation of its case with the interests of the government in preventing the "graymail" that could lead the government to abandon a prosecution in order to protect sensitive information.

In civil cases, the issue remains much more controversial. This is because of the one-sided nature of the state secrets privilege, which is available only to the Government. The privilege is based in case law, not codified as its criminal docket counterpart is.[86] The privilege may be invoked not only as a basis for denying certain evidence sought by the plaintiff in a civil matter but also to protect the Government from the Hobson's choice of revealing secret information in order to mount a successful defense.[87] In the context of the so-called War on Terror, the state secrets privilege has been invoked in cases alleging extraordinary rendition and torture at the hands of U.S. officials or their foreign allies.[88] Assertion of the privilege typically results in dismissal of the entire case, even when the plaintiff's well-pled allegations, if "true or essentially true, [would lead] all fair-minded people" to agree that the plaintiff "has suffered injuries as a result of our country's mistake and deserves a remedy."[89]

If Hayhanen and Rhodes were the star witnesses, the most sensational piece of physical evidence was the mysterious hollow nickel mentioned earlier. Hayhanen had given a similarly doctored Finnish coin to officials at the U.S. Embassy in Paris in order to establish his bona fides as a defector.[90] Counsel on both sides argued vigorously about the admission of these coins into evidence. The Government claimed that the coins could be nothing but a spy's container; the defense insisted that these were common novelty items available in any magic store.[91] Of course, the arguments of counsel do not constitute evidence, as the judge reminded them. But this argument played out in front of the jury because both counsel wanted to implant their theories of the case in the minds of the jurors.

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86. United States v. Reynolds, 345 U.S. 1 (1953); *In re* National Security Agency Telecommunications Records Litigation, 564 F. Supp. 2d 1109, 1114, 1118-1119, 1123 (2008).

87. *Reynolds*, 345 U.S. 1.

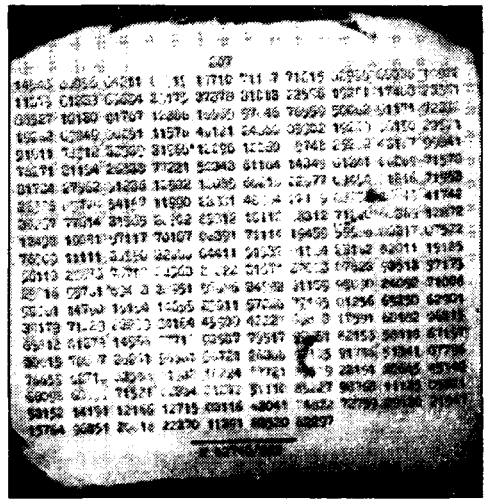
88. Arar v. Ashcroft, 585 F.3d 559 (2d Cir., 2009), *cert. denied*, 130 S.Ct. 3409 (2010); El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 552 U.S. 947 (2007).

89. The quote is from Judge T.S. Ellis III commenting on his dismissal of the civil action of Khaled El-Masri, alleging his extraordinary rendition and torture. El-Masri v. Tenet, 437 F.Supp.2d 530, 541 (E.D.Va. 2006). For a critical discussion of the state secrets privilege, see Louis Fisher, *The State Secrets Privilege: Relying on Reynolds*, 122 POL. SCI. QUARTERLY 385 (2007).

90. DONOVAN, *supra* note 32, at 159.

91. *Id.*at 161-162.

THE "HOLLOW NICKEL" OPENED UP[92]



ENCRYPTED MESSAGE HIDDEN WITHIN THE HOLLOW NICKEL

B. The Jury

Likewise, the presence of a jury meant that the direct testimony of Hayhanen and Rhodes was pockmarked with Donovan's voiced objections: to the leading form of questions asked by the prosecution, the relevance of the issues raised in the direct examination, and the competence of the witness to answer them. These objections, like the rulings on them from the bench, illustrate the great trust placed in juries by the American system. As

92. These images of the "hollow nickel" and the encrypted message found inside it, submitted as evidence against Abel, are available at http://www.fbi.gov/libref/historic/famcases/abel/abel.htm.

often as not, Judge Byers answered each objection by noting that "[i]t is for the jury to say whether or not they consider it of any weight as a matter of evidence."[93]

These exchanges about both physical evidence and witness testimony also illustrate the direct and oral focus of an American criminal trial, as opposed to the largely written focus of continental European systems that rely on a case file composed of evidence gathered by the state's investigator (a task deemed too important to leave to partisans on each side). Donovan's closing argument explicitly made the comparison between the common law adversarial system of justice and the continental European inquisitorial system, but with the natural bias of an American lawyer for his own system. Addressing the jury, he explained:

> We believe that our trial-by-jury system is the best system ever devised for arriving at the truth. Why is your function so important? You might say to yourselves, 'His Honor, the judge, knows all the law applicable to the case; he has been trained for many years to evaluate evidence. Why, then, shouldn't cases such as this simply be left to the lawyers and the judges?' The answer is that from the time of Aristotle many centuries ago, ordinary citizens are not content to leave these questions to the lawyers and judges, with their legalisms and their legal niceties.[94]

Of course, Donovan himself knew from his experience in Europe that a great many republics place no such faith in the layman and do indeed prefer the experience and training of professional finders of fact as well as finders of law. A recurring theme found in the press reports of Abel's trial, as in the arguments of the lawyers themselves, was that Abel would receive a fairer trial in the United States than any captured American spy could expect to receive in the Soviet Union. The criminal justice system then in place in the USSR had been strongly influenced by the continental European inquisitorial system, in which juries played no role and the trial was essentially a process of evaluating the work of the state's investigator in compiling the case file that is the hallmark of that system.[95]

Colonel Abel's case evidenced a deep trust in the jury and the adversarial contest conducted before them, even in the context of serious matters of national security. The case is worth recollecting today with the new fear of terrorism and the urge by some quarters toward a form of

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93. *Id.* at 212. It should be noted that even an overruled objection, when made in the presence of the jury (as Donovan's objections almost always were), serves notice to the finders of fact that the evidence is not incontestably admitted for their evaluation.

94. *Id.* at 224.

95. JEFFREY KAHN, *Adversarial Principles and the Case File in Russian Criminal Procedure*, *in* RUSSIA AND THE COUNCIL OF EUROPE: TEN YEARS AFTER 107-133 (2010).

Schmittian exceptionalism for terrorism cases.[96] In the United States, some call for special courts to try suspected terrorists. Others prefer military commissions. And some would simply opt not to try such individuals at all in order to extract intelligence without the limitations placed on government conduct by the constitutional guarantees that apply to criminal trials and the statutory and international law that governs military conduct.[97] Military commissions may well be a reasonable choice in those factual circumstances when the law of armed conflict is the governing law.[98] All of these options, including military commissions, are much less defensible for cases arising out of circumstances that the law of armed conflict cannot reasonably be seen to govern. What is sought then by advocates of the use of Article III courts is the control that juries and independent, fact-gathering defense attorneys take away from the state.

C. Negotiating the Rules in the Guantánamo Detainee Cases

How such exceptionalism might manifest itself may be gleaned by the inquisitorial turn apparent in new rules of evidence devised to adjudicate habeas corpus proceedings for detainees at Guantànamo Bay. These rules depart from the traditional approach to evidence in the United States. Evidence – whether in the form of statements or physical evidence – is only admissible in an American courtroom through the testimony of live witnesses.[99] That is not the case in classically inquisitorial systems of

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96. I refer to the dangerous views of the Nazi legal theoretician, Carl Schmitt. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., 1985) (1922) ("Sovereign is he who decides on the exception.").

97. What limits remain by virtue of the Due Process Clause is another matter further complicated by jurisdictional questions of extraterritoriality and interpretive ones concerning the Constitution's restrictions on state action.

98. *See generally* THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE (2009). Although perhaps too late to rectify the excesses of the past, the Department of Justice and the Department of Defense have established a protocol for choosing the forum for prosecuting detainees at Guantánamo Bay that acknowledges this choice-of-law constraint (statements of David S. Kris, Assistant Attorney General, Before the Committee on the Judiciary Subcommittee on Terrorism and Homeland Security, U.S. Senate, for a hearing titled "Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond," July 28, 2009) ("Decisions about the appropriate forum for prosecution of Guantanamo detainees will be made on a case-by-case basis in the months ahead, based on the criteria set forth in the protocol. Among the factors that will be considered are the nature of the offenses, the identity of the victims, the location in which the offense occurred, and the context in which the defendant was apprehended."), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=4002& wit_id=8156.

99. U.S. CONST., amend. VI. As Justice Scalia noted "[t]he common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers." Crawford v. Washington, 541 U.S. 36, 43 (2004). In fact, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. Of course, previously recorded

justice, in which it could be said, *Quod non est in actis, non est in mundo* – "What is not in the file is not in the world."[100] Were Abel's case conducted in a Soviet courtroom (or, for that matter, a Russian courtroom today), much of his lawyer's work would be very different. Pre-trial work would consist primarily in attempts to influence the composition of the case file, *i.e.* to influence the development of the *prosecution's* case. An independent investigation and search for evidence by the defense would be contrary to tradition, akin to obstruction of justice in some jurisdictions.

Generally speaking, this approach is not followed in courts in the United States.[101] The Confrontation Clause of the Sixth Amendment to the Constitution and American rules of evidence and procedure are all premised on the view that live, oral testimony, subject to cross-examination should be the foundation of a trial, not a case file.[102] However, in the context of habeas petitions from detainees at Guantánamo Bay, this conventional understanding has been thrown into doubt.[103] (It is important to recognize that a petition for a writ of habeas corpus is decided through a civil action, to which the Confrontation Clause by its own terms does not apply, although the underlying detention in question typically arises in the criminal context or, recently, the context of terrorism cases.) The Supreme Court indicated in *Hamdi v. Rumsfeld*, that the exigencies of the overseas military context could result in relaxed evidentiary standards for some documentary and physical evidence used to establish the status of detainees. As the *Hamdi* plurality put it:

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testimony is admissible so long as the defense has had an adequate, prior opportunity to cross-examine the now unavailable witness.

100. BERNHARD GROSSFELD & JOSEF HOELTZENBEIN, *Language, Poetry, and Law: Order Patents*, 10 L. & BUS. REV. OF THE AMER. 669, 670 (2004); *see also* KAHN, *supra* note 95, at 107, 109-110.

101. *See* Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), finding that affidavits by forensic specialists about the methodology and results of drug tests were testimonial and therefore subject to the Confrontation Clause of the Sixth Amendment to the Constitution.

102. It is true that some documentary evidence is deemed by statute to be self-authenticating. *See* Fed. R. Evid. 901(b)(10) & 902. Of course, the regular requirements of relevance and admissibility would still apply, and evidence deemed testimonial in nature would additionally be subject to the requirements of the Confrontation Clause. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE §§8.84 & 8.86 (4th ed., 2009).

103. An excellent recent summary of these cases is provided by Chisun Lee, *Judges Reject Evidence in Gitmo Cases*, NAT'L L.J. 1, 24 (Aug. 16, 2010) (noting that the United States has lost 37 of 53 habeas cases decided to date). Lee reports that the Obama administration "has already said that at least 48 of the remaining 176 prisoners at Guantánamo will be held indefinitely because they're too dangerous to release but can't be prosecuted successfully in military or civilian court," in part because of "coercion-tainted evidence." *Id.*

> [T]he exigencies of the circumstances may demand that, aside from these core elements [of notice and fair opportunity to respond to the Government's allegations], enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.[104]

Exactly what that meant in practice was left to the district courts to sort out. Sometimes, the result has sounded more in the inquisitorial tradition of criminal justice than in the adversarial one. "When the government in these proceedings asks for a presumption of *authenticity* on these grounds, it effectively is asking the judge to reverse the usual practice of requiring the proponent of potentially-inauthentic evidence to carry the burden of proving its authenticity."[105] Some courts have been persuaded to give such a presumption to records on which the Government relies to prove up its detention, notwithstanding chain-of-custody and other problems that ordinarily are grounds for placing the *burden* of authentication (with live witnesses) on the Government. So far, no court has gone so far as to grant the Government a presumption of *accuracy* regarding such evidence.[106] And attempts by judges to generate rules concerning the use of hearsay, to determine burdens assigned and presumptions accorded to each side, to establish standards of proof, and to resolve many other procedural and evidentiary issues have little in common save their complexity and variety.[107]

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104. Hamdi v. Rumsfeld, 542 U.S. 507, 533-534 (2004). In Boumediene v. Bush, 128 S.Ct. 2229, 2277 (2008), the Supreme Court also indicated that detainees "may invoke the fundamental procedural protections of habeas corpus." Although these procedural protections "need not resemble [those] in a criminal trial," merely be "effective" and "meaningful," the Court did not attempt to define with any precision, the contours of these terms. *Boumediene,* 128 S.Ct. at 2269.

105. *See* BENJAMIN WITTES, ROBERT CHESNEY, & RABEA BENHALIM, THE EMERGING LAW OF DETENTION: THE GUANTANAMO HABEAS CASES AS LAWMAKING 33 (2010).

106. *Id.* at 34.

107. *See id.* at 35-50. As the authors of this exhaustive and thorough report demonstrate, the judges themselves initially differed about whether the use of hearsay was best resolved by a preliminary determination of the admissibility of this evidence or by a merits-stage assessment of its reliability. In Al Bihani v. Obama, 590 F.3d 866, 879-880 (D.C. Cir. 2010), the Court of Appeals for the District of Columbia Circuit held that the proper approach was a reliability assessment because the concerns of an adversarial criminal trial are not present ("The habeas judge is not asked, as he would be in a trial, to administrate a complicated clash of adversarial viewpoints to synthesize a process-dependent form of Hegelian legal truth."). Nevertheless, these judges have struggled with how to accomplish this assessment. And, as Wittes, Chesney, and Benhalim note, while admissibility decisions

Whatever one's view on the necessity of such judicial creativity in this context, the erosion of the American preference (if not principle) of adversarial confrontation through live witness testimony is clear. In some contexts (e.g. the capture of combatants on a traditional battlefield), such a departure is neither provocative nor ahistorical; in other contexts (e.g. detention of individuals in circumstances that make their status uncertain), the issue remains a serious one. It is an open question whether these evidentiary concessions will leak into the American criminal justice system if the Government wishes to prosecute suspected terrorists and their agents with evidence submitted in the form of classified intelligence reports citing unidentified sources, anonymous foreign experts, and summaries of out-of-court statements by unavailable witnesses. At least one federal court has permitted the testimony of an anonymous Israeli intelligence official as an expert witness (a status with special advantages under the Federal Rules of Evidence) in a criminal prosecution.[108]

On the other hand, other courts have preserved their traditional role and used traditional rules and well-established procedures to do so. Most recently, this may be seen in the trial of Ahmed Khalfan Ghailani, who was charged with hundreds of counts of murder and numerous counts of conspiracy in supplying the explosives used in the 1998 bombings of the American embassies in Tanzania and Kenya.[109] The Federal Rules of Criminal Procedure and the Classified Information Procedures Act governed the disclosure of discoverable materials.[110] Judge Lewis A. Kaplan in the Southern District of New York heard and resolved numerous issues of routine procedure as well as legal issues of profound constitutional significance. Among these were motions to dismiss the indictment on the grounds that Ghailani's alleged torture at the hands of the CIA violated the

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are reviewed *de novo*, a more deferential standard of review would apply to an appeal of the fact-finder's assessment of reliability. WITTES, CHESNEY & BENHALIM, *supra* note 105, at 39.

108. United States v. Holy Land Foundation for Relief & Development, No. 3:04-CR-240-G, 2007 WL 2059722 at 7-8 (N.D. Tex. July 16, 2007).

109. *See* Docket No. 550, Tenth Superseding Indictment, filed Mar. 12, 2001, United States v. Ghailani, No. 1:98-cr-1023-LAK (S.D.N.Y.). Of course, it should be noted that early in this prosecution the Government made the deliberate decision not to seek the admission of statements made during Ghailani's period of detention at CIA secret sites overseas and in the custody of the Department of Defense at Guantánamo Bay. The Government also chose not to charge a capital offense. Both decisions originated at least partly out of a desire to avoid the potential disclosure of evidence concerning those detention sites and conduct that occurred there. BENJAMIN WEISER & CHARLIE SAVAGE, *At Terror Trial, Big Questions Were Avoided*, N.Y. TIMES, Nov. 19, 2010, at A1.

110. *See, e.g.*, Docket No. 763, Modified Protective Order Pertaining to Unclassified Information, filed July 15, 2009, United States v. Ghailani, No. 1:98-cr-1023-LAK (S.D.N.Y.) and Docket No. 765, Modified Protective Order Pertaining to Classified Information, filed July 21, 2009, United States v. Ghailani, No. 1:98-cr-1023-LAK (S.D.N.Y.).

Fifth Amendment,[111] that his lengthy military detention violated the Speedy Trial Clause of the Sixth Amendment,[112] and that the deprivation of earlier assigned military counsel denied him his constitutional right to the effective assistance of counsel.[113] These motions were all denied in written judicial opinions ranging from eleven to forty-eight pages of legal analysis. On the eve of trial, however, Judge Kaplan precluded the testimony of a government witness whose identity was obtained through the coercive interrogation of the defendant in secret prisons outside the United States.[114]

Notwithstanding the extraordinary nature of the crimes for which Ghailani stood accused, all of these judicial opinions are noteworthy for being unexceptional, publicly available, minimally redacted, reasoned dispositions of the arguments before the court. Following a sixteen day trial, Ghailani was found guilty of one charge of conspiracy to destroy government property but acquitted of the murder and other conspiracy charges.[115] Ghailani faced a minimum twenty-year sentence. On January 25, 2011, Judge Kaplan sentenced Ghailani to life in prison, recommending that he be held in conditions of highest security, and ordered Ghailani to make restitution totaling over thirty-three million dollars.[116] The restitution, payable to the victims and their surviving dependants, will almost certainly never be paid. But there was nothing symbolic in Judge Kaplan's concluding words after the trial, thanking the jurors and telling them that their verdict showed that: "American justice can be rendered calmly, deliberately and fairly by ordinary people, people who are not beholden to any government, not even ours. It can be rendered with fidelity to the Constitution. You have a right to be proud of your service in this case."[117]

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111. Docket No. 943, Memorandum Opinion, filed May 10, 2010, United States v. Ghailani, No. 1:98-cr-1023-LAK (S.D.N.Y.).

112. Docket No. 976, Memorandum Opinion, filed July 13, 2010, United States v. Ghailani, No. 1:98-cr-1023-LAK (S.D.N.Y.).

113. Docket No. 828, Memorandum Opinion, filed Nov. 11, 2009, United States v. Ghailani, No. 1:98-cr-1023-LAK (S.D.N.Y.).

114. United States v. Ghailani, No. S1098 Crim. 1023 (LAK), 2010 WL 4058043 (S.D.N.Y. Oct. 6, 2010). It should be noted that this opinion was in harmony with Judge Kaplan's denial of the defendant's motion to dismiss the indictment as punishment for his alleged torture. In that previous opinion, Judge Kaplan concluded that dismissal would only be appropriate if there were "a causal connection" such that the conviction "would be a product of the government misconduct that violated the Due Process Clause." *See supra* note 111, at 5-6. Since the testimony offered appeared to establish such a connection, Judge Kaplan prohibited its use at trial. This possibility was foreseen in this earlier motion to dismiss. *See supra* note 111, at 7.

115. Benjamin Weiser, *U.S. Jury Acquits Former Detainee of Most Charges*, N.Y. TIMES, Nov. 18, 2010, at A1.

116. Docket No. 1090, Judgment, filed Jan. 25, 2011, United States v. Ghailani, No. 1:98-cr-1023-LAK (S.D.N.Y.).

117. Benjamin Weiser, *supra* note 115. This assertion must be assessed in the context of the apparent overlapping legal regimes Ghailani faced. Earlier in the case, Judge Kaplan observed that Ghailani's status as an enemy combatant could result in his continued

Many in the United States advocate alternatives to existing criminal procedures to combat the threat of terrorism. The fear that animates such arguments was known in Abel's time, too. Less than a fortnight before his trial began, the Soviet Union launched Sputnik-1.[118] The federal prosecutor closed the government's case by describing Abel's offense as "directed at our very existence and through us at the free world and civilization itself, particularly in light of the times."[119] The very same words could be uttered today. It is worth recalling Justice Jackson's healthy suspicion of exceptional emergency powers, since emergency powers "tend to kindle emergencies."[120]

IV. DONOVAN'S MOTION TO EXCLUDE EVIDENCE

The most interesting legal issue in the case, and the one that led to its argument – twice – before the Supreme Court, was Donovan's motion to suppress the physical evidence gathered from Abel's room in the Hotel Latham. Donovan argued that the search violated the Fourth Amendment to the Constitution.[121] Donovan's description of his legal theory resonates today:

> A decision on the highest policy level had to be made by the Department of Justice, with respect to the man in Room 839:
>
> (1) Should the Department, as a law enforcement agency, obtain a warrant for his arrest on espionage or other criminal charges, and also a search warrant? If so, the man could be seized and his room searched but he would have to be publicly brought before the nearest available U.S. Commissioner or Federal Judge without unnecessary delay, be entitled to counsel at once, and then be remanded to a federal prison.
>
> (2) On the other hand, would it be more in the national interest for the Department, exercising its counter-espionage functions, to seize the man and his effects in a clandestine manner, conceal

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detention "until hostilities between the United States and al Qaeda and the Taliban end, even if he were found not guilty." *Id.*

118. DONOVAN, *supra* note 32, at 120.

119. DONOVAN, *supra* note 32, at 238.

120. Youngstown Sheet & Tube Comoany v. Sawyer, 343 U.S. 579, 650-51 (1952) (Jackson, J., concurring).

121. U.S. CONST., amend. IV ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

> his capture from his co-conspirators as long as possible, and meanwhile seek to induce him to come over to our side?[122]

Notwithstanding, or perhaps because of, his own experience in World War II and as general counsel to the OSS, Donovan was convinced that the state could lawfully conduct the warrantless arrest of Abel, hoping to turn him into a double agent for counterintelligence purposes, or it could prosecute him for the capital crime of espionage. But it could not do both:

> We have not criticized their calculated gamble to grab Abel and his effects, keep his seizure secret as long as possible, and try to persuade him to aid the United States. We stated in the courts below that from a counter-espionage, viewpoint, the decision seems prospectively sound. But we maintain that the Department of Justice, having elected to gamble that Abel would 'cooperate' and then having lost, cannot subsequently seek to reverse its steps, prosecute Abel on evidence inadmissible in federal court, and pay lip service to due process of law.[123]

The choice having been made not to comply with constitutional criminal procedure, the evidence obtained through this detention and failed attempt to "turn" Abel could not be used in a criminal trial: it was fruit from a poisonous tree.[124] The ostensible basis for the arrest was an administrative detention order signed by the INS district director, not a warrant issued by a judge, and the INS agents waited patiently while FBI agents began to

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122. Brief for Petitioner, *supra* note 17, at 14-15.

123. *Id.* at 12-13. Superficially, Ahmed Ghailani's case may appear very similar to Colonel Abel's experience, but on an even grander scale. *See* Docket No. 976, *supra* note 112, at 9 (noting that the nearly five years spent in detention "was a deliberate decision to further intelligence-gathering efforts at the immediate expense of delaying the criminal prosecution."). Ghailani argued that "[my] arrest in 2004 presented the government with a choice: it either could have prosecuted him at that time on this indictment or it could have detained and questioned him in the interests of national security. But it could not do both." *See* Docket No. 976, *supra* note 112, at 17.

Nevertheless, the cases are distinguishable. However hot the Cold War was in 1957, the two sides were not engaged in an active military conflict. Unlike Abel, Ghailani was seized abroad by the forces of a foreign power, which transferred him to the custody of the CIA, which in turn transferred him to the custody of the Department of Defense. *See* Docket No. 976, *supra* note 112, at 3. Finally, leaving to one side the possibility that these actors violated the relevant body of law that governed Ghailani's detention, these actions do not evince the pretextual manipulation of law by one executive official acting at the direction of another. In fact, in sharp contrast to the intentions of Abel's custodians, the Government stated that "it will not use anything that Ghailani said while in CIA custody, or the fruits of any such statement, in this prosecution." *See* Docket No. 943, *supra* note 111, at 7.

124. The *Abel* Court would cite Weeks v. United States, 232 U.S. 383, 398 (1914), for this proposition, but it would be another three years after upholding Abel's conviction before the Supreme Court adopted this metaphor. Wong Sun v. United States, 371 U.S. 471, 488 (1963).

question Abel on what they called "a matter involving the internal security of the United States."[125] The search of Abel's room was "unreasonable" in the language of the Fourth Amendment, because it was not a good faith effort to discover evidence of his alienage, which was all that was permitted during a legitimate administrative arrest on immigration charges for which no judicial warrant was required.[126] Abel's immigration status was a pretext to roust him from his bed and search for evidence to confirm the FBI's suspicion that he was a spy, all the while circumventing the warrant requirement of the Fourth Amendment. According to the defense, the INS was a willing instrument of the FBI from start to finish.[127]

The Government opposed Donovan's motion on the grounds that Abel's arrest on an INS administrative warrant was perfectly legal and not governed by the same constitutional rules as an arrest on a criminal warrant. The arrest being lawful, a search of Abel and his surroundings for weapons

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125. Interview by Vin Arthey with Ed Gamber, one of the FBI agent who participated in the arrest. ARTHEY, *supra* note 32, at xxxi, 204-205. In retirement, FBI special agent Gamber, recalled that "[w]e got no co-operation from him whatsoever. He said nothing. He just sat there and looked at the floor. He didn't say a word." ARTHEY, *supra* note 32, at 205. This is mostly confirmed by the testimony of his partner, FBI Special Agent Paul Blasco. Direct Examination of FBI Special Agent Paul J. Blasco, Hearing on Defendant's Motion to Suppress, Transcript, *supra* note 4, at 180-181 (testifying that Abel either sat silently or gave very terse answers). Whether by instinct or training, Abel's conduct at the time of his arrest illustrated the constitutional right to remain silent. The FBI gave Abel no such warning on the morning of his arrest because, according to Agent Blasco's testimony, "we were conducting an interview to solicit his cooperation." Direct Examination of FBI Special Agent Paul J. Blasco, Hearing on Defendant's Motion to Suppress, Transcript, *supra* note 4, at 185-187.

126. An argument based on the subjective "good faith" of the government official would get little traction today. The Supreme Court made clear in Whren v. United States, 517 U.S. 806, 813 (1996), that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." The *Whren* Court dismissed arguments to the contrary that were based partly on dicta from Abel's case, describing the Abel Court's treatment of pretext as "plainly inconsistent" with later opinions. *Whren*, 517 U.S. at 816.

It may seem odd to the modern scholar of constitutional criminal procedure that Donovan did not argue that the search of Abel's room was presumptively invalid because of its broad sweep. Chimel v. California, 395 U.S. 752, 763 (1969) ("There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs – or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The 'adherence to judicial processes' mandated by the Fourth Amendment requires no less.") (footnote omitted). The answer is that *Chimel*, as its date implies, was not the law in 1957. The law was stated in United States v. Rabinowitz, 339 U.S. 56 (1950), which upheld a similar search based on the officer's expectation of finding evidence of the underlying offense.

Interestingly, Justice Frankfurter wrote a strong dissent to *Rabinowitz*, which case he distinguished in his majority opinion in Abel's case. *See* Abel v. United States, 362 U.S. at 236-37.

127. Brief for Petitioner, *supra* note 17, at 4-6, 21-22.

or evidence that could have been seized under a criminal warrant was also permissible.[128] Likewise, there was nothing improper in the collaboration of the INS and the FBI. The initial arrest was made in good faith: the FBI believed that Hayhanen's refusal to testify left it with insufficient evidence to secure a criminal warrant.[129] Apprehension of Abel – believed to be a top Soviet agent – was therefore only possible on grounds of an immigration violation.[130] When Hayhanen had a change of heart and agreed to testify, and (thanks to the search of Abel's room) more evidence of espionage became available, the Government "expeditiously" presented the case to a Grand Jury, which returned the three-count indictment in the case.[131] In other words, what else was the Justice Department to do, hamstrung by a recalcitrant witness but charged with responsibility for counter-espionage?

It is interesting to note how the two sides seemed to be arguing past each other. The Government's arguments were marked by the formality of their legal reasoning: the arrest was valid because the proper government channels for accomplishing it had been carefully followed and the seizure of each item was justified by a different rule or judicial opinion. Abel's lawyers, on the other hand, focused on the abuse of formalities to accomplish an ulterior purpose.

As Donovan summarized this divergence between the parties' reasoning, he asserted that the Government's case rested:

> on a false premise which may be mumbled, "an arrest is an arrest is an arrest." The truth is that what the Government termed "an arrest *sui generis*" in its District Court briefs is not an arrest at all, either civil or criminal. It is a detention process, whereby a person is taken into custody for the sole and expressed purpose of deportation from the United States. Yet the Government's basic reasoning, and the applicability of the case authority cited in its brief, rest upon the misleading assertion that there was a "valid arrest" in the case at bar.

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128. Brief for the United States, *supra* note 43, at 29-34. It should be noted that different justifications were offered for the seizure of different items: the false birth certificates and other items using an alias that were found in Abel's room were seized as evidence of the immigration violation; the coded message that Abel tried to hide up his sleeve was seized as evidence of another crime that Abel had been seeking to conceal on his person, which itself was subject to search incident to his arrest; and the cipher book, hollowed-out pencil, and microfilm, the government argued, had been abandoned by Abel when he threw them away. *Id.* at 55-60. Although interesting, these lines of argument are not especially peculiar to Abel's case, and will not be pursued here.

129. *Id.* at 6.

130. *Id.*

131. *Id.* at 46-47. *See also* Transcript, *supra* note 4, at 58 (Affidavit of Kevin T. Maroney, Special Attorney, Department of Justice). As suggested, *supra* text accompanying note 23, "expeditiously" is a relative term. Abel was held in extrajudicial, secret detention for almost seven weeks before he was publicly indicted for a crime. *See supra* note 23.

> Thus, too, the Government weaves back and forth in an elaborate defense of its process for deportation (the legality of which we have never disputed) and then leap-frogs to the unwarranted conclusion that process appropriate for deportation is also appropriate to obtain evidence of a capital crime – even when the arresting officers admittedly were convinced that such a capital crime had been committed but had decided to avoid regular criminal procedures at that time.[132]

These arguments bring to mind the controversy concerning the use of the immigration laws and material witness warrants to apprehend and interrogate individuals shortly after the terrorist attacks of September 11, 2001. The arguments of the Government had the same tone: these detentions were formally lawful, not to mention urgently necessary in the aftermath of the attack. The arguments of lawyers defending detainees were similar to Donovan's plea: processes made for one purpose are unlawfully abused when they are employed for such different objectives.

Donovan's suppression motion was denied, again making headlines.[133] First, although admitting the matter was one of first impression, the court held that no warrant was required for the search of Abel's hotel room following his detention on an immigration violation, which was not a criminal offense.[134] Second, the court saw no reason why the INS and the FBI, different branches of the Justice Department, could not work in tandem, the former seizing Abel on the immigration violation and the latter investigating his suspected espionage. The court observed, neatly ducking the issue of procedure in favor of result, "[t]he Department of Justice owes its first allegiance to the United States, and it is not perceived that an alien unlawfully in this country has suffered any deprivation of Constitutional rights" in the factual circumstances of Abel's arrest.[135] At the hearing on the motion, Judge Byers expressed his view that he should not tell the FBI how to do its job.[136]

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132. Reply Brief for Petitioner at 2, Abel v. United States, 362 U.S. 217 (1960), No.2, 1959 WL 101554 (internal citation omitted).

133. *Abel Loses Move To Bar Evidence*, N.Y. TIMES, Oct. 12, 1957, at 5.

134. United States v. Abel, 155 F.Supp. 8, 10-11 (E.D.N.Y. 1957).

135. *Id.* at 11.

136. Transcript, *supra* note 4, at 131 (Excerpt from district court oral argument on motion to suppress: "I think it is the job of the F.B.I. to bring to light information concerning violations of the law and I don't think it is part of the Court's duty to tell them how they should function.").

After Abel's conviction, Donovan appealed on precisely this point. The Court of Appeals for the Second Circuit upheld the lower court's ruling on Donovan's pre-trial suppression motion. The Second Circuit considered deportation to be similar enough to a criminal arrest to extend the general rule permitting search of the premises where an arrest is made, even a warrantless one.[137] The court was willing to allow the INS and FBI to work in tandem when it suited their purposes, because it saw a clear line dividing the different agents.[138] Thus, the good faith of the INS in pursuing its lawful objective was not tainted by the ulterior motives of the FBI.[139] In any event, the appellate court did not appear interested in parsing this line with a trial record that "fairly shrieks the guilt" of Colonel Abel of the KGB.[140]

Donovan appealed again and the Supreme Court granted his petition for a writ of certiorari on October 13, 1958.[141] The Court limited its grant to two issues: (1) Was the administrative warrant issued by the INS constitutionally adequate to search and seize evidence in Abel's rooms after he was detained for deportation proceedings but not arrested for having committed a crime; and (2) Was the Constitution violated when such evidence, unrelated to the immigration interests of the INS, was later used to convict Abel of espionage? These questions were briefed and argued, but the Court found itself unable to decide the case. Therefore, the Court ordered reargument, refining the issue to its technical foundations:

1. Whether under laws and Constitution of the United States (a) the administrative warrant of the New York Acting District Director of the Immigration and Naturalization Service was validly issued, (b) such administrative warrant constituted a valid basis for arresting petitioner or taking him into custody, and (c) such warrant furnished a valid basis for the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham.

2. Whether, independently of such administrative warrant, petitioner's arrest, and the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham, were valid under the laws and Constitution of the United States.

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137. United States v. Abel, 258 F.2d 485, 492-94 (2d Cir. 1958).
138. *Id.*
139. *Id.* at 494.
140. *Id.* at 502 (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953)).
141. Abel v. United States, 358 U.S. 813 (1958).

3. Whether on the record before us the issues involved in Questions '1(a),' '1(b),' and '2' are properly before the Court.[142]

Justice Frankfurter put this detailed description of the issue more plainly in his opinion for the Court: "We are asked to find that the Government resorted to a subterfuge, that the Immigration and Naturalization Service warrant here was a pretense and sham, was not what it purported to be."[143] Unusually, the lawyers were each granted one and one-half hours for oral argument (instead of the usual 30 minutes), signaling the difficulty the Court appeared to have with this case.[144]

The opinion this argument produced was a narrow one, with only five of the nine justices voting to uphold Abel's conviction. Justice Felix Frankfurter wrote the majority opinion, which was joined by Justices Clark, Harlan, Whittaker and Stewart. In principle, Justice Frankfurter found it an easy matter to note the importance of preventing abuse of the government's administrative powers as a tool to circumvent constitutional and statutory safeguards in a federal criminal investigation.[145] Perhaps in order to cobble together his slim majority, Justice Frankfurter used issue 3 to uphold the conviction on the narrowest possible grounds: the Supreme Court would not second guess the lower courts' judgment that the trial record evidenced no bad faith.[146] Frankfurter noted how Judge Byers had held a pretrial hearing at which the arguments for suppression of the evidence on these grounds were fully aired and testimony on the matter heard before issuing a finding of no evidence of bad faith.[147] The Court of Appeals had affirmed this ruling after its own review. The Court held that the lower courts could reasonably conclude that the FBI's use of the INS's administrative powers to enter Abel's room, apply pressure, and extract evidence had all been part

142. Abel v. United States, 359 U.S. 940 (1959).

143. Abel v. United States, 362 U.S. 217, 225 (1960).

144. Abel v. United States, 359 U.S. 940 (1959).

145. Abel v. United States, 362 U.S. 217, 226 (1960). The Court of Appeals for the Eighth Circuit speculated in dicta that the Court's disapproval of such a method of law enforcement may no longer be good law. United States v. Clarke, 110 F.3d 612, 614 (8th Cir. 1997) ("We wonder, in the first place, about the continued validity of *Abel* in light of *Whren*."). In *Whren*, police used a traffic stop for failing to signal before turning as a pretext to search the defendants' car for drugs, their true purpose for stopping the vehicle. Since probable cause existed to believe that defendants had violated a part of the traffic code (a state of existence that is almost always true for every car on the road if observed long enough), the Court unanimously held that the subjective intentions of the police "play no role in ordinary, probable-cause Fourth Amendment analysis." Whren v. United States, 517 U.S. 806, 813 (1996).

146. Similarly, the issue whether the administrative warrants failed to satisfy the Fourth Amendment's warrant requirement was dismissed by the Court for not having been preserved on appeal. Abel v. United States, 362 U.S. 217, 230-234 (1960).

147. Abel v. United States, 362 U.S. 217, 226 (1960).

of a "bona fide preliminary step in a deportation proceeding."[148] The formal distinctions between the decision-making authorities of two components of the Justice Department had all been carefully preserved, thus making the practical effect of collaboration acceptable to Justice Frankfurter: "The test is whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime."[149]

Finding the arrest valid, the Court upheld the search made incident to it. Although subject to no judicial review prior to its use by INS agents, the administrative warrant did require approval by an independent officer of the Justice Department. This was protection enough, Justice Frankfurter concluded, especially considering that warrantless arrests based upon probable cause of crime were made without any such review at all.[150] The search being lawful, there was no basis for excluding the evidence found by it from use at trial. Even the cipher pad and hollowed-out pencil, quickly thrown away by Abel before being escorted from his hotel room and found after the FBI returned after Abel had "checked out," were held validly obtained: what could be unlawful about Government use of abandoned property?[151]

The fact that both the FBI and the INS were components of the same agency mattered a lot to Justice Frankfurter, who drew a distinction between their legitimate cooperation and an instance where one agency was acting "not within its lawful authority but as the cat's paw of another, unrelated branch of the Government."[152] At the time, this line served to

148. *Id.* at 230.

149. *Id.*

150. *Id.* at 236-237.

151. *Id.* at 240-241.

152. *Id.* at 230. Justice Frankfurter approvingly cited "the story told in" Colyer v. Skeffington, 265 F. 17 (D.Mass. 1920), *rev'd by* Skeffington v. Katzeff, 277 F. 129 (1st Cir. 1922), "[f]or a contrast to the proper cooperation between two branches of a single Department of Justice as revealed in this case". *Id.* at 229. Why cite a district court case forty years old, especially only for "the story" told in it, not the holding? The answer has two parts. First, the case was of particular interest to Justice Frankfurter because it had benefited from amicus briefs submitted by two trusted lawyers: the young Professor Felix Frankfurter himself, alongside his colleague at Harvard, Zechariah Chafee. Colyer and others had been arrested by immigration officials, then under the jurisdiction of the Department of Labor. Though nominally responsible, these officials had abdicated their decision-making authority to agents of the Justice Department's Bureau of Investigation (the precursor to the FBI) to effect the warrantless arrest of aliens affiliated with the Communist Party. *Id.* at 30. The court described in vivid detail how "[i]n cases of doubt, aliens, already frightened by the terroristic methods of their arrest and detention, were, in the absence of counsel, easily led into some kind of admission as to their ownership or knowledge of communistic or so-called seditious literature." *Id.* at 47.

But the holding in *Colyer* did not support Frankfurter's distinction in the Abel case. Judge Anderson had rejected the petitioner's argument that the Labor Department's deportation hearings were void because, in essence, controlled by the Department of Justice.

distinguish cases in which an administrative agency abused its power to engage in warrantless arrests and searches by collaboration with a separate agency with a separate mandate. The health inspector, for example, could not demand entry into a home on grounds of a suspected public nuisance, only to signal a waiting police officer to the illicit activities found during his pretextual search.

But perhaps this was a distinction without a difference. Was it so unimaginable that different components of a single federal agency as large and powerful as the Department of Justice might be tempted to combine and magnify their array of separate powers just as two separate agencies might? Wasn't this all the more likely when agents were under pressure to protect the country from the threat of anarchists, or Communists, or terrorists? None other than FBI Director J. Edgar Hoover had publicly boasted after Abel's conviction that the FBI had first concluded that Abel was a spy and then directed the INS to use its powers to snatch him, a point Donovan emphasized in one of his Supreme Court briefs.[153] By testing the FBI agents for "bad faith," Justice Douglas noted in dissent, the Court had knocked down a straw man: "The issue is not whether these F.B.I. agents acted in bad faith. Of course they did not. The question is how far zeal may be permitted to carry officials bent on law enforcement."[154] Justice Douglas

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Id. at 51. Justice Frankfurter now advanced in dicta in the *Abel* case the holding his side advanced, but lost, in Colyer's case. (The district court ultimately granted habeas following a lengthy examination of socialist and communist doctrine, finding as a matter of law that this manifesto did not advocate the overthrow of the United States Government, a statutory prerequisite to deportation, and that in many cases the petitioners were denied due process of law in the conduct of their arrests and deportation hearings. *Id.* at 58-71. The first part of this holding was reversed by the Court of Appeals. Skeffington v. Katzeff, 277 F. 129, 133 (1st Cir. 1922).) Forty years later, Frankfurter had the last word.

To be completely fair to Justice Frankfurter, Donovan may have goaded him into citing *Colyer v. Skeffington*. His opening brief was the only one to cite the case, recalling his work as an advocate for aliens subject to deportation during the excesses of the Palmer Raids to the Justice now sitting in a case alleging excesses following the McCarthy era. Brief for Petitioner, *supra* note 17.

153. Supplemental Brief for Petitioner at 4, Abel v. U.S., 362 U.S. 217 (1958), No.2, 1959 WL 101555 (citing J. EDGAR HOOVER, MASTERS OF DECEIT, THE STORY OF COMMUNISM IN AMERICA AND HOW TO FIGHT IT 298-299 (1958)). Donovan used Hoover's words to support a statement by the Director of the INS that "Abel would not have been arrested by immigration officials on June 21 if American counter-intelligence had not requested it," but which the appellate court had dismissed as hearsay. Supp. Brief for Petitioner, *supra* at 3.

154. Abel v. United States, 362 U.S. at 245. Justice Brennan, in his dissent, made a more practical critique of the focus on good faith: "If the search here were of the sort the Fourth Amendment contemplated, there would be no need for the elaborate, if somewhat pointless, inquiry the Court makes into the 'good faith' of the arrest. Once it is established that a simple executive arrest of one as a deportable alien gives the arresting offices the power to search his premises, what precise state of mind on the part of the officers will make the arrest a 'subterfuge' for the start of criminal proceedings, and render the search

mockingly noted the real reason why, though Abel had been kept under surveillance for a month, no time could be found to obtain a warrant from a judge or commissioner:

> If the F.B.I. agents had gone to a magistrate, any search warrant issued would by terms of the Fourth Amendment have to 'particularly' describe 'the place to be searched' and the 'things to be seized.' How much more convenient it is for the police to find a way around those specific requirements of the Fourth Amendment! What a hindrance it is to work laboriously through constitutional procedures! How much easier to go to another official in the same department! The administrative officer can give a warrant good for unlimited search. No more showing of probable cause to a magistrate! No more limitations on what may be searched and when![155]

Justice Brennan, in his dissent, noted that the failure to secure a warrant from an independent magistrate *before* the arrest consequently meant no obligation to present Abel to an independent magistrate *after* his arrest, to publicly "justify what had been done."[156] There was no one, that is, to ask why Abel needed to be transported halfway across the country, kept in solitary confinement, and interrogated daily for weeks without the assistance of counsel. As Justice Brennan put it, "As far as the world knew, he had vanished."[157] Wasn't that reason enough to remain faithful to the Fourth Amendment's requirement that a warrant be obtained before an arrest? Justice Frankfurter did not cite to his own opinion for the Court in *McNabb v. United States*, in which he expressed a different view of the role of federal law officers. This reference had to be supplied by Justice Brennan in his dissent.[158] Nor did he cite to his opinion for the Court in *Mallory v. United States*, issued the year of Abel's arrest, reversing a rape

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unreasonable?" *Id.* at 253.

155. *Id.* at 246.

156. *Id.* at 251.

157. *Id.* at 252.

158. *Id.* at 250. *See* McNabb v. United States, 318 U.S. 332, 343-344 (1943) ("A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment.... Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication.... It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement.") By comparison, Abel was held significantly longer, and without counsel, than all of the detained members of the McNabb family combined.

conviction because the police delayed his presentation before a magistrate until their daylong interrogation had succeeded in eliciting a confession.[159]

Beginning in the 1970s, investigations by United States Senate committees, most notably the one led by Senator Frank Church (the Select Committee to Study Governmental Operations with respect to Intelligence Activities), disclosed how the FBI and the CIA had abused their powers both separately and in collaboration with each other. At the FBI, the result was what became known as the "wall" between the Bureau's counterintelligence and law enforcement functions. An agent involved with an investigation on one side of this barrier could not communicate with an agent on the other side. Abel's case could not have proceeded in the same way under this regime; indeed, it is doubtful whether Abel would ever have seen the inside of a courtroom. But back in 1960, the Supreme Court had effectively decided that no "wall" was needed between these two aspects of the Justice Department's mandate, even though Abel's incommunicado, secret detention in McAllen could hardly have been said to advance any immigration purpose.

The danger Douglas perceived was that the list of administrative officers allowed to conduct warrantless searches would grow to swallow the rule set by the Fourth Amendment. The countervailing variable he neglected to include in this equation was the political process. Citizens who found administrative searches too frequent or intrusive could limit or strip entirely such powers from government agencies through the political process. The growth of the American administrative state is a history of that debate.

Of course, aliens cannot vote. Many have noted the sorry pattern in American law that begins with restrictions on the rights of foreigners only to end with the expansion of those restrictions to American citizens.[160] The Palmer raids, described so vividly in the *Colyer* case cited by Justice Frankfurter, resulted in mass warrantless arrests of suspected alien communists in which it was understood that citizens would occasionally be swept up in the dragnet, acceptable collateral victims.[161] Curtailment of the rights of those accused was deemed necessary "to protect the Government's interests" during a struggle against a perceived imminent danger.[162]

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159. *See* Mallory v. United States, 354 U.S. 449, 456 (1957) ("Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'").

160. DAVID COLE, ENEMY ALIENS *passim* (2003).

161. Colyer v. Skeffington, 265 F. 17, 37, 40-45 (D. Mass. 1920).

162. *Id.* at 46.

The dissenters in the Abel case forecast that the effect of this opinion would be no different and, indeed, it wasn't. In fact, every generation perceives imminent dangers and, with unconscious repetition, employs the same language of justification to commit the same infringements of the rights of some, usually aliens, in defense of others, usually citizens. But the exceptional inevitably becomes the status quo. Slowly but surely, the abuses (as they soon come to be seen once the crisis has passed) are extended to citizens. The danger lurks, as Justice Brandeis observed, "in insidious encroachment by men of zeal, well-meaning but without understanding."[163]

CONCLUSION

Between Abel's case and today, the United States experienced the dramatic reforms to constitutional criminal procedure introduced by the Supreme Court under the leadership of Chief Justice Earl Warren. On the other hand, the temptation to return to old ways remains present. After September 11th, Attorney General John Ashcroft authorized the use of material witness warrants and arrest on immigration violations to pursue the investigation of the attacks. Not a single conviction resulted from the 762 persons seized, detained, and sometimes unlawfully and brutally treated as a result of these immigration-related arrests.[164] Ironically, the INS had more "success" with Abel's administrative arrest and criminal conviction.

The core evidentiary issue that rose to the Supreme Court, which Donovan described as one that "would trouble any student of constitutional law," remains with us today.[165] The presidential commission tasked with the investigation of the terrorist attacks of September 11, 2001, focused much of its attention on the so-called "wall" separating the FBI's law enforcement and counterintelligence responsibilities.[166] The wall had been built because of the very sort of misuse of power that Donovan described in his motion. After 9/11, however, the wall was deemed too high and too impermeable, and blamed for the intelligence failures that left the United States vulnerable to attack. Today, experienced and gifted legal minds argue that the wall should be weakened, if not torn down completely.[167] But

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163. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

164. EDWARD ALDEN, THE CLOSING OF THE AMERICAN BORDER 98 (2008); OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (2003), *available at* http://www.justice.gov/oig/special/0312/final.pdf.

165. DONOVAN, *supra* note 32, at 117.

166. FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004).

167. STEWART A. BAKER, SKATING ON STILTS: WHY WE AREN'T STOPPING TOMORROW'S TERRORISM (2010).

this ends-justifies-the-means thinking was known to Donovan, too, who concluded his brief with a warning that resonates today:

> Abel is an alien charged with the capital offense of Soviet espionage. It may seem anomalous that our Constitutional guarantees protect such a man. The unthinking may view America's conscientious adherence to the principles of a free society as an altruism so scrupulous that self-destruction must result. Yet our principles are engraved in the history and the law of the land. If the free world is not faithful to its own moral code, there remains no society for which others may hunger.[168]

Justice Frankfurter's slim majority upheld the conviction by deferring to the lower courts' evaluations of good faith. This may well be the same deferential standard of review used to evaluate the reliability determinations of trial courts assessing hearsay and other exceptional pieces of evidence submitted by the Government in the habeas cases of detainees held at Guantánamo Bay.[169]

Lest there be any doubt that the issues we now confront should not seem new or unfamiliar to us, ask yourself how familiar this summary description, made by James Donovan about his client's experience more than fifty years ago, sounds today: "The simple fact was that the Colonel and all his belongings were made to disappear from the face of the earth while FBI agents, in a counterintelligence function, carried out their plan."[170] And ask whether the prosecutor's closing argument resonates in your mind as much with the threat of terrorism today as it clearly resonated for a jury deciding Abel's fate in the shadow of the threat of communism: Colonel Abel's actions were "directed at our very institutions and through us at the free world and civilization itself."[171] Our time is well spent learning from our history.

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168. DONOVAN, *supra* note 32, at 66.

169. *See supra* text accompanying note 107.

170. DONOVAN, *supra* note 32, at 111.

171. Edith Evans Asbury, *Abel Jury Hears Final Arguments*, N.Y. TIMES, Oct. 25, 1957, at 4.

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